IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 11TH DECEMBER 2007 / 20TH AGRAHAYANA 1929

SA.No. 41 of 1994()

AS.143/1989 of DISTRICT COURT, THRISSUR
OS.1/1983 of PRL.MUNSIFF COURT,THRISSUR
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APPELLANT/APPELLANT/PLAINTIFF:

LONAPPAN, S/O.KOONAMPILAVU, KOCHAPPU, AGED 59,
GOVERNMENT SERVANT, THALORE, MUKUNDAPURAM TALUK

BY ADV. SRI.V.R.KESAVA KAIMAL
SRI.N.M.MADHU
SMT.USHA C.KAIMAL

RESPONDENTS/RESPONDENTS/DEFENDANTS:
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1. ALIA, W/O.MALIAKKAL PORINCHU, AGED ABOUT 69,
EDAKKUNNY DESOM, EDAKKUNNY VILLAGE,
THRISSUR TALUK

2. LAZAR, S/O.THARAYIL VARIED, AGED ABOUT 44,
EDAKKUNNY VILLAGE, THRISSUR TALUK

BY ADV. SRI.P.K.ASHOKAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 11/12/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A .NO. 41 OF 1994

Dated 11th December 2007

J U D G M E N T

Plaintiff in O.S.1/1983 on the file of Munsiff court, Trissur is the appellant. Defendants are respondents. Appellant instituted the suit seeking a decree for mandatory as well as permanent prohibitory injunction. Case of the appellant was that plaint A schedule property belongs to him and plaint B schedule property is a common property belonging to appellant and respondents. Plaint B schedule property includes the well and the way to the well from plaint A schedule property. Case of the appellant is that he is the owner in possession of the property which lies to the north of plaint A schedule property where B schedule property is situated. The well is jointly owned by the appellant and respondents and respondents are not entitled to construct any structure encroaching into the plaint B schedule property or to cause any obstruction to take water from the well from the plaint B schedule

property and appellant is entitled to decree for mandatory injunction to remove the encroachment made by respondents and permanent prohibitory injunction restraining respondents from making further construction. Respondents resisted the suit contending that appellant has no right or title to plaint B schedule property and first respondent has absolute right over 5 1/8 cents in Survey No.314/6 and there is no well in the property of appellant and the boundary separating survey in the survey boundaries of survey No.314/7 and appellant has no right over the well which is situated in the property of respondents and appellant is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of Pws.1 to 5, DW1, Exts.A1 to A5, B1 to B2(e) and C1 dismissed the suit holding that appellant can succeed only on establishing that well in plaint B schedule property forms part of the property belonging to the appellant and part of the well in the property belonging to respondents. The burden is on the appellant to establish that fact. He did not establish that fact and therefore he is not entitled to the decree sought for. Appellant challenged the decree and judgment before District court, Thrissur in A.S.143/1989. Learned District Judge on re-

appreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Appeal was admitted formulating the following substantial questions of law.

> 1) Is the courts below went wrong in not deciding the rights of the parties on the basis of evidence let in when the parties are conscious of the matter in issue.
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> 2) Are the courts below justified in discarding Ext.C1 report especially when it forms part of evidence on record.
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> 3) Are the courts below justified in converting a suit for injunction into a suit for boundary dispute.
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> 4) Whether appellant is entitled for mandatory injunction under Section 39 of Specific Relief Act when respondents are not claiming exclusive ownership of B schedule property.
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> 5) Whether judgment of the first appellate court is bad as statutory requirements under Order XLI Rule 31 of Code of Civil Procedure.

4. Learned counsel appearing for appellant was

heard.

5. Argument of learned counsel is that being a final fact finding court, first appellate court should have analysed the evidence and found whether the case set up by respondent is true or not and as it was not done judgment of first appellate court is not sustainable. Learned counsel argued that before the trial court appellant had filed I.A.604/1983, an application to appoint a surveyor to measure the property and fix the boundaries of the appellant and respondents and it was dismissed for default and at least first appellate court should have allowed that application and in the interest of justice case may be remanded to the trial court for fixing the boundary. Learned counsel argued that on the evidence courts below should have found that appellant has half right in the well and plaint B schedule property and respondents are not entitled to cause any obstruction to appellant using it.

5. On hearing the learned counsel and going through the judgments and records of courts below it is clear that the actual dispute between the parties is where exactly the boundary separating the property of respondents and appellant lies. What was claimed by appellant is that the disputed well falls on the boundary

separating the properties and half of the well is in the property belonging to the appellant and the remaining half in the property of respondents and therefore respondents are not entitled to cause any obstruction. As rightly found by courts below appellant can succeed in the suit only on establishing that at least a portion of the well falls in his property. That could be established only on fixing the boundary. Therefore, though suit was filed only for mandatory injunction and permanent prohibitory injunction, actual relief which should have been sought for is fixation of the boundary. Argument of learned counsel is that if the trial court had allowed I.A.604/1983, entire dispute would have been resolved and dismissal was unjustified. If the appellant had challenged dismissal of I.A.604/1983 before the first appellate court the argument could have been accepted. Unfortunately, it is seen that this aspect was not taken as a ground before the first appellate court. I.A.604/1983 was dismissed on 23/7/1984 as there was no representation for the petitioner. As rightly found by first appellate court if the said petition was filed with the intention of getting boundaries fixed and to resolve the dispute, at least a petition should have been filed for restoration of the petition. Fact

that appellant did not do so and did not take it as a ground before the first appellate court establish that he did seriously prosecute that petition. In such circumstances, it is not in the interest of justice to remand the suit at this belated stage after 23 years from the date of dismissal of that application. On the other hand appellant proceeded with the suit, as if, it is a suit for mandatory and permanent prohibitory injunction and fixation of the boundary is not warranted. In such circumstances, I do not find that remand of the suit is warranted at this belated stage.

6. On the evidence it is clear that appellant did not establish that a part of the disputed well falls in his property. In such circumstances, appellant is not entitled to the decree for mandatory and prohibitory injunction sought for. There is no merit in the appeal. Appeal is dismissed. It is made clear that dismissal of the appeal will not be a bar appellant from seeking fixation of the boundaries based on title deed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.41 OF 1994

11th December 2007

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